Supreme Court, U.S.
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No. 01-1468

IN THE

Supreme Court of the United States

PHONOMETRICS, INC.,

Petitioner,

v.

HOTEL CORPORATION OF THE PACIFIC, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly granted, and the circuit court properly affirmed granting of, the motion to dismiss for lack of personal jurisdiction filed by Respondent.

2. Whether this Court should decline to consider Petitioner's argument concerning the district court's decision to dismiss for lack of personal jurisdiction where Respondent has never maintained a regular or established place of business in, nor has it ever been a resident of, the forum below, and generally does not have the "significant contacts" constitutionally required to establish personal jurisdiction.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Hotel Corporation Of The Pacific, Inc., is a wholly subsidiary of ResortQuest International, Inc., a publicly traded company.

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STATEMENT OF THE CASE

A. Procedural History

This action arises from allegations of patent infringement made by Petitioner in a complaint filed with the United States District Court for the Northern District of California on February 26, 1996. On July 1, 1996, the California District Court entered a stay of all proceedings. The stay was entered as a result of a motion joined, *inter alia*, by Respondent requesting such relief. On December 11, 1996, the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred this action to Judge Kenneth Ryskamp at the United States District Court for the Southern District of Florida for consolidated or coordinated pretrial proceedings.

On October 23, 1998, Judge Ryskamp entered an order dismissing this action *sua sponte* and on December 8, 1998, final judgment was entered against Petitioner. Judge Ryskamp's *sua sponte* dismissal was reversed on appeal by the United States Court of Appeals for the Federal Circuit, *Phonometrics, Inc. v. Hospitality Franchise Sys.*, 203 F.3d 790, 53 U.S.P.Q.2d (Fed. Cir. 2000), and the case was re-opened below on April 19, 2000.

On May 3, 2000, Respondent filed a motion to dismiss the complaint for lack of personal jurisdiction. On September 25, 2000, Respondent's motion to dismiss was granted and final judgment was entered against Petitioner. Petitioner appealed the dismissal to the Federal Circuit and, on October 3, 2001, the dismissal was affirmed *per curiam*. Petitioner filed petitions for panel rehearing and rehearing *en banc* both of which were denied by the Federal Circuit on November 13, 2001.

B. Relevant Facts

Petitioner filed a complaint alleging that Respondent infringed United States Patent No. 3,769,463 (hereinafter "the '463 patent") through the use of certain telephone equipment. Petitioner alleges that during the relevant time period Respondent maintained a regular and established place of business within the territorial limits of the United States District Court for the Northern District of California.

Petitioner's allegations of patent infringement are limited to infringing activities purportedly committed by Respondent within a relatively narrow window of time beginning on February 26, 1990 and ending on October 30, 1990 (hereinafter "the relevant time.") During the relevant time, Respondent had its corporate offices in the State of Hawaii. During the relevant time, Respondent dedicated itself solely to the management of hotels and other hospitality properties owned by third parties; Respondent did not own any of the properties it managed. During the relevant time, none of the properties managed by Respondent were located in any state other than Hawaii. Moreover, Respondent did not decide what type of telephone equipment was selected, purchased or installed at any of the properties it managed during the relevant time.

Respondent has never maintained any regular and established place of business in the Northern District of California. In fact, Respondent has: (i) never done any business in California; (ii) never derived any profit from any property located in California; (iii) never solicited business related to any hotel or hospitality property located in California; (iv) never been licensed to do business in California, and (v) never been a resident of California.

There is no evidence on the record which refutes the evidence presented by Respondent that it did not manage or own any hotels in California or that it did not have any significant contacts with California during the time period relevant to Petitioner's allegations.

In fact, the only reason Respondent was named as a defendant in this case is that Petitioner intended to sue every hotel chain which operated a property in Northern California during the relevant time, and erroneously assumed that certain properties located in San Francisco were managed or owned by Respondent.

Petitioner presented no evidence to the district court establishing that Respondent had an actual presence, however tenuous, in Northern California. Instead, Petitioner relied on arguments which purported to explain the reasons for its erroneous assumptions regarding the ownership or management of properties by Respondent in Northern California. Both the district and circuit courts found Petitioner's arguments unpersuasive.

REASONS FOR DENYING THE WRIT

I. The Underlying Action Is Rendered Irrelevant By The Federal Circuit's Decisions In The *Intellicall* And *Northern Telecom* Actions And Petitioner's Admission That Respondent Does Not Infringe The Patent-In-Suit

The '463 patent claims an apparatus for automatically computing and recording the cost of a long-distance telephone call. As described in the specification, cumulative call cost information about the call is displayed to the caller while the call is being made. Claim 1[1] of the '463 patent, the only

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1. Claim 1 of the '463 patent reads, in its entirety, as follows:

> An electronic solid state long-distance telephone call cost computer apparatus for computing and recording the cost of each long-distance telephone call initiated from a given calling telephone, actuated by the lifting and replacement of the calling telephone to operate switch means coupled to the calling telephone, and further actuated by a call-completion signal generated in the telephone system when a called party answers at a called telephone, the computer apparatus comprising:
>
> call timing means for timing the duration of each completed call;
>
> settable charge selector means for storing initial fixed charge data for a given predetermined initial call interval and incremental charge data for subsequent additional predetermined incremental call intervals;

(Cont'd)

(Cont'd)

call cost register means, including a digital display, for providing a substantially instantaneous display of cumulative call cost in dollars and cents;

and computer circuit means, coupled to said switch, to said timing means, to said charge selector means, and to said call cost register means, for automatically recording, in the call cost register means, the cost of each long-distance call made from the calling telephone, said computer circuit means comprising:

reset means for resetting said timing means and said call cost register means immediately upon occurrence of said call-completion signal;

initial cost transfer means initiating operation of said call timing means and for applying the complete initial fixed charge data from said charge selector means to said call cost register means substantially instantaneously upon resetting of said call timing means and said call cost register;

incremental cost transfer means for applying the complete incremental charge data from said charge selector means to said call cost register means substantially instantaneously upon completion of timing out the initial call interval by said call timing means and for again applying the complete incremental charge data from said charge selector means to said call cost register means substantially instantaneously upon completion of timing out of each incremental call interval following said initial call interval;

(Cont'd)

claim at issue in this case, was interpreted in *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384 (Fed. Cir. 1992), as requiring any infringing device to "provide an *instantaneous visual display* of cumulative call cost in dollars and cents." *Intellicall*, 952 F.2d at 1386-87 (emphasis added).

The scope of claim 1 was revisited in *Phonometrics, Inc. v. Northern Telecom Inc.*, 133 F.3d 1459 (Fed. Cir. 1998), where the court went into great detail in evaluating the scope of the '463 patent. The court in *Northern Telecom* emphasized that its previous interpretation in *Intellicall* was indeed correct. The court further explained its interpretation by stating that one of the primary components at issue in claim 1, the "call cost register means", must "provide[] the caller with real time, accurate information about the cost of the call via digital display as the long distance charges accrue during the call." *Northern Telecom*, 133 F.3d at 1465.

Petitioner did not seek review of either the *Intellicall* or the *Northern Telecom* decisions. Accordingly, all appellate remedies having been exhausted, the definitive interpretation of claim 1 requires that in order for a device to infringe the '463 patent it must provide a caller using the device to place along distance call with a real time digital display of the cost of the call as the call progresses.

However, by Petitioner's own admissions on the record, Petitioner cannot prove that any device owned or operated

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(Cont'd)

> and termination means for interrupting operation of said computer apparatus, with the cumulative call cost held in and displayed by said call cost register means, upon operation of said switch by replacement of the calling telephone.

by Respondent during the relevant time infringes the '463 patent. Furthermore, Petitioner has admitted that respondent has never owned or operated any such device.

Specifically, shortly after the Respondent was dismissed from the case by the district court, Petitioner's corporate representative, and one of the inventors of the '463 patent, testified under oath that Petitioner is not aware of any hotel, including those managed by Petitioner, having telephone systems that display the cost of the call to the caller as the call is taking place. Moreover, during a February 13, 1997 hearing before the district court, Petitioner's counsel stated that "the fact of the matter is that there are none of these equipments that these defendants have that has a display to the caller during the call in progress." Petitioner's statements are a direct admission that Respondent, as well as every one of Respondent's co-defendants below, has not infringed the '463 patent.

On the basis of these admissions and the Federal Circuit's interpretation of claim 1 in *Intellicall* and *Northern Telecom*, on April 12, 2002, the district court granted summary judgment against Petitioner in connection with all remaining co-defendants in the case below. Prior to that, the district court granted summary judgment for the defendant in an identical case filed by Petitioner against an identically situated hotel chain, also on the basis of the *Intellicall* and *Northern Telecom* decisions. *Phonometrics, Inc. v. Choice Hotels*, 117 F. Supp. 2d 1341 (S. D. Fla. 2000). The *Choice Hotels* decision was subsequently affirmed by the Federal Circuit in *Phonometrics, Inc. v. Choice Hotels*, No. 01-1045, 2001 U.S. App. LEXIS 23565 (Fed. Cir. Oct. 9, 2001).

In fact, the district court below is so convinced that Petitioner's admissions, and the previous decisions by the Federal Circuit, have rendered Petitioner's claims totally meritless, that on the same day the court granted summary judgment in favor of Respondent's co-defendants below, it granted a motion for sanctions under FED. R. CIV. P. 11 against Petitioner. In its ruling on the Rule 11 motion, the district court judge below stated that "when [Petitioner] continued to pursue his claims after *Northern Telecom*, he was advocating legal theories which he knew were no longer tenable."[2]

Accordingly, it is clear that regardless of the outcome of the of the instant proceeding, Petitioner, by its own admission, has no valid claim for patent infringement against Respondent. In fact, should this matter be remanded to the district court, Petitioner's continued prosecution of its frivolous claims of patent infringement will, without a doubt,

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2. It is apparent that the Federal Circuit shares the district court's conclusion that Petitioner's claims are totally devoid of merit. To wit, in its opinion affirming the *Choice Hotels* decision, the Federal Circuit stated:

> [W]e have already addressed and answered the precise question presented in this appeal . . . [u]nder principles of stare decisis, moreover, future panels like the present panel will follow the claim construction set forth by our court in [Intellicall and Northern Telecom] and, therefore, we would not welcome further appeals seeking to re-litigate the meaning of that phrase. Indeed, further appeal on that issue would appear to be subject to possible sanctions as frivolously filed under Fed. R. App. P. 38.

Choice Hotels, 2001 U.S. App. LEXIS 23565, at *3 -*4

be sanctioned under FED. R. CIV. P. 11 and/or FED. R. APP. P. 38 in accordance with the admonitions of the district court and the Federal Circuit.

With all deference due to this Court, Respondent would propose that this case does not warrant the Court's review. It is well settled that a petition for a writ of certiorari will be granted only for compelling reasons. SUP. CT. R. 10. None of the traditional reasons for granting certiorari (such as a conflict between two courts of appeal; a decision affecting an important federal question not yet settled by this Court; or a significant departure from the accepted and usual course of judicial proceedings invoking the Court's supervisory power) have been raised by Petitioner.

On the contrary, Petitioner requests the Court to review this case purely on grounds that the circuit and district courts made erroneous factual findings (i.e., that Respondent did not have "significant contacts" with the forum in question) and misapplied a properly stated rule of law (i.e., that Respondent did not waive its defense of lack of personal jurisdiction.) Both are grounds upon which certiorari is rarely, if ever, granted. *Id.*

To compound matters, Petitioner seeks review of a decision so insignificant that it did not even merit an opinion from the Federal Circuit, in a case which is all but decided regardless of whether Petitioner's appeal is successful. Accordingly, on these grounds alone, the Petition should be denied.

II. The District Court Properly Granted, And The Circuit Court Properly Affirmed Granting Of, The Motion To Dismiss For Lack Of Personal Jurisdiction

The sole issue raised in the appeal below by Petitioner was whether Respondent, pursuant to Rule 12(h) of the Federal Rules of Civil Procedure, waived a defense of lack of personal jurisdiction. In fact, the clear and unambiguous language of Rule 12(h) states that in order for a prior Rule 12 motion to act as a bar to a subsequent motion to dismiss for lack of personal jurisdiction, both motions must be made by the same party. To the extent the Trial Court's dismissal *sua sponte* can be deemed to be a motion under Rule 12, it was clearly not filed by Respondent and therefore it cannot act to bar Respondent's motion to dismiss. In addition, contrary to Petitioner's assertions, Respondent's joinder in a motion to stay, which was eventually granted, similarly cannot act as a bar to a subsequent motion to dismiss under Rule 12. Finally, it was Petitioner itself who waived any argument under Rule 12(h) by failing to raise it prior to filing the circuit court appeal.

Substantively, the district court reached the correct legal conclusions in granting the motion to dismiss for lack of personal jurisdiction. The court below applied the proper law and after reviewing all of the evidence presented by the parties concluded that Respondent's lacked the required significant contacts with the Northern District of California to satisfy the Due Process requirements of the Fourteenth Amendment pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny.

Accordingly, the district court's ruling was correct and the circuit court was correct in leaving it undisturbed.

A. The Trial Court's *Sua Sponte* Dismissal Cannot be Imputed to Respondent as a Prior Rule 12 Motion

Petitioner's primary argument below was that the district court's October 23, 1998 *sua sponte* dismissal of the complaint is equivalent to a motion to dismiss under Rule 12(b)(6) which should be imputed on Respondent because Respondent "accepted" the dismissal. Petitioner argued that the purported 12(b)(6) motion should be imputed on Respondent so as to prevent any subsequent motions under Rule 12, including the 12(b)(2) motion which was eventually granted. Petitioner's argument is unsupported by law and is unpersuasive. *See Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 504-505 (Fed. Cir. 1995.)

Petitioner's argument is fatally flawed in at least two respects. First of all, the district court *sua sponte* dismissed Petitioner's complaint. No party filed a motion to dismiss under Rule 12. The district court of its own accord decided to dismiss the complaint. There is simply no legal basis to impute on Respondent or any other party the district court's *sua sponte* action as a Rule 12 motion to dismiss. The fact that the circuit court reviewed the *sua sponte* dismissal using the same standards used in a 12(b)(6) motion provides no basis to impute on Respondent actions not taken by Respondent. To accept Petitioner's argument would require this Court to adopt the unreasonable notion that an order entered by the district court on its own accord, without any input from, or notice to, a defendant, may be imputed on the defendant to the defendant's prejudice. Petitioner is unable to cite a single authority in support of its position. The circuit court, therefore, rightfully rejected Petitioner's argument.

Second, Rule 12(g) FED. R. CIV. P., which forms the basis for the waiver provisions of Rule 12(h)(1)(A), states that "if a *party* makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted." (emphasis added). The district court's *sua sponte* dismissal was not a motion made by "a party." It was a decision made by the district court without any input or motion by any party. Accordingly, since there was no motion made by a party, the provisions of Rules 12(g) and 12(h)(1)(A) are inapplicable to the instant facts.

A contrary application of Rules 12(g) and 12(h)(1)(A) would deprive Respondent of due process. In the instant situation, Respondent did not learn of the district court's *sua sponte* dismissal until after it had been entered. Contrary to Petitioner's suggestion, it was not up to Respondent to "accept" or reject the district court's dismissal. It was simply entered by the district court and Respondent, like the Petitioner, was bound by it. Even if Respondent had learned of the dismissal prior to it having been entered, Respondent would not have had an opportunity to advance its defense of lack of personal jurisdiction since the matter below was under a court-ordered stay. Under Petitioner's reading of Rules 12(g) and 12(h)(1)(A), once the dismissal was entered it was too late for Respondent to raise its jurisdictional defense. Respondent would have no avenue to assert a defense of lack of personal jurisdiction. The circuit court properly reject Petitioner's argument and this Court should leave it undisturbed.

During the circuit court appeal, Petitioner cited two cases in support of its waiver theory. Both cases were easily

distinguished on the facts and neither lends any support to the relief requested by Petitioner. In *Zelson v. Thumforde*, 412 F.2d 56 (3d Cir. 1969) the trial court was reversed when it dismissed a complaint for lack of personal jurisdiction. In that case, however, the defendant who sought dismissal had filed a motion to dismiss pursuant to a statute of limitations prior to seeking dismissal on jurisdictional grounds. In the court's own words,

> [i]t should be emphasized that this is not a case where a defendant takes no action whatsoever to submit himself to the jurisdiction of the court . . . [i]n the instant appeal, of course, the defendants-appellants did move to dismiss, on the statute of limitations ground, without raising the issue of proper service of process.

Id. at 59. Clearly the facts in *Zelson* are distinguishable from those here since Respondent did not take any actions which would submit it to the court's jurisdiction.

Similarly, in *Trust Co. of Louisiana v. NNP, Inc.*, 104 F.3d 1478 (5th Cir. 1997), the court ruled that the claim of lack of personal jurisdiction was waived by a defendant who participated in an entire trial without raising the defense and then raised the defense for the first time on appeal. This ruling in fact lends support to Respondent's argument, *infra*, that Petitioner has waived its right to assert an argument for the first time on appeal. It does not lend any support to Petitioner's position

B. Respondent's Joinder in a Co-Defendant's Motion for Stay Does Not Constitute Waiver of a Motion to Dismiss for Lack of Personal Jurisdiction.

Petitioner's argument, raised for the first time in its December 20, 2000 circuit court brief, that joinder in a motion to stay constitutes waiver of the personal jurisdiction question, has been waived and should not even have been considered by the circuit court. Notwithstanding this, the circuit court entertained the argument and found it lacking in merit.

The filing which Petitioner claims constitutes a waiver under Rule 12(h), was Respondent's joinder in a Motion for a Stay, *or in the Alternative*, for a More Definite Statement, filed by co-defendant below, Red Lion Hotels, Inc. The request for a more definite statement was raised only as an alternative relief and was only to be considered by the district court in the event the motion for stay was denied. The district court, recognizing the propriety of entering a stay under the circumstances, granted the motion for a stay and did not even consider the request for alternative relief. This much is clear from the order granting the motion for a stay which does not even address the merits of the request for alternative relief. Accordingly, since the request for a more definite statement was never even reached or decided by the district court below, it could not constitute a waiver of the personal jurisdiction question which resulted in Petitioner's dismissal.

The express intent of Rule 12(h), as noted in the official Advisory Committee Notes for the 1966 amendment, is to prevent "piecemeal consideration of a case" through the filing of "successive motions" under Rule 12. Had the circuit court

ruled that the aforementioned joinder should act as a waiver under Rule 12(h), it would not have promoted the express intent of the Rule's drafters. It would have been inconsistent with that express intent to allow Rule 12(h) to be used to dictate the waiver of a clearly valid jurisdictional defense on the basis of a request for alternative relief which was never even addressed or ruled upon by the Court with which it was filed.[3] Moreover, it is contrary to the law and unjust to do so under the circumstances of the instant matter where the Petitioner failed altogether to even raise the issue of waiver until more than seven months after Appellee filed the motion from which judgment is appealed.

C. Petitioner Has Waived Any Argument Under Rule 12(h) By Failing To Raise It Below

Petitioner waived its right to assert any argument under Rule 12(h) by failing to raise it during any of the district court proceedings. In fact, Rule 12(h) was never even mentioned in any of the several pleadings or memoranda of law filed by Petitioner in response to Respondent's motion to dismiss and was never raised by Petitioner's counsel during the hearing held on the same motion or at any time prior to the instant appeal.

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3. Appellant asserts that the request for a more definite statement was ultimately denied by the district court. However, that denial was solely in response to a motion requesting a continuation of the stay in discovery filed by Respondent's co-defendants below. Respondent did not join in said motion and therefore should not be held to have waived the defense of lack of personal jurisdiction based on that ruling. Moreover, the district court's ruling was based on events subsequent to the filing of Respondent's original joinder (i.e., the circuit court's reversal of the sua sponte dismissal of the Complaint) and, therefore, the fact remains that the merits of the original alternative request for more definite statement were never addressed prior to it becoming a moot point.

It is well settled that an appellate court generally need not consider an argument not raised in the proceedings below and this Court should not carve out an exception for this case. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976); *Boggs v. West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999); *Braun, Inc. v. Dynamics Corp. of America*, 975 F.2d 815, 821 (Fed. Cir 1992); *CPG Products Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1009 (Fed. Cir. 1985).

Petitioner, for the first time, raised its argument under Rule 12(h) in its appellate brief dated December 20, 2000 without providing any justification for omitting same from any proceeding before the district court.

D. The District Court's Finding of Lack of Personal Jurisdiction was in Accord With the Applicable Law

Certiorari should be denied because the record clearly shows that the district court correctly granted, and the circuit court correctly affirmed granting of, Respondent's motion to dismiss for lack of personal jurisdiction.

1. *The district court Applied the Proper Law*

In order to determine whether it may exercise personal jurisdiction over an out of state defendant, the court must determine: (1) whether the state long-arm statute permits assertion of jurisdiction; and (2) whether sufficient "minimum contacts" exist to satisfy the due process requirements of the Fourteenth Amendment so that maintenance of the suit does not offend "traditional notions of fair play and substantial justice" under *International Shoe*. *See 3D Sys. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 48 U.S.P.Q.2d 1773 (Fed. Cir. 1998).

In analyzing the issue of personal jurisdiction over a defendant accused of patent infringement, a district court must apply the law of the Federal Circuit rather than that of the regional circuit in which the case arises. *See Akro Corp. v. Luker*, 45 F.3d 1541, 1543 (Fed. Cir.), *cert. denied*, 515 U.S. 1122 (1995); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994). Despite this requirement, the same basic test utilized in the Eleventh Circuit for determining the existence of personal jurisdiction applies in the Federal Circuit: the court must conduct a two-part inquiry to determine whether personal jurisdiction exists under the forum state's long arm statute and the Due Process Clause of the United States Constitution. *See Akro*, 45 F.3d at 1544-45; *Beverly Hills Fan*, 21 F.3d at 1564-66; *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 256 (11th Cir. 1996); *Maxwell Chase Techs., L.L.C. v. KMB Produce, Inc.*, 79 F. Supp. 2d 1364 (11th Cir. 1999).

This is exactly the kind of analysis the district court engaged in rendering its decision. The district court first determined, and the parties are in agreement, that California's long-arm statute, and not Florida's, was the proper state statute to apply for the first part of the analysis. California's long-arm statute reads in its entirety: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States" Cal. Code Civ. Proc. § 410.10.

California courts have held that the limits of the state long arm statute are co-extensive with the limits of the United States Constitution. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). Where a state's long arm statute confers personal jurisdiction to the limits of Due Process, the court may pass over analysis of the statute and

exercise jurisdiction where the constitutional requirements are satisfied. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d at 1484; *Allegiant Physicians Serv., Inc. v. Sturdy Memorial Hospital*, 926 F. Supp. 1106, 1112 (N.D. Ga. 1996). Accordingly, the district court properly analyzed the question of personal jurisdiction in accordance with *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) and its progeny.

2. *The Record is Replete with Uncontroverted Evidence that Respondent Lacks the Requisite Significant Contacts with Northern California*

The Federal Circuit generally defers to a state's highest court to interpret whether a defendant is amenable to process in the forum state. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488, 96 S. Ct. 2308, 2312, 49 L. Ed. 2d 1 (1976); *see also 3D Sys. v. Aarothech Labs*, 160 F.3d at 1377, 48 U.S.P.Q.2d at 1775-76. The Ninth Circuit has recognized that in Florida, when the Complaint contains sufficient allegations to form a basis for *in personam* jurisdiction, the burden shifts to the defendant to challenge plaintiff's allegations by affidavits or other pleadings. *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977). If the defendant sufficiently challenges plaintiff's assertions in an evidentiary hearing, the plaintiff must affirmatively support its jurisdictional allegations and may not merely rely upon the factual allegations set forth in the complaint. *Id.* at 787; *see also Prentice v. Prentice Colour, Inc.*, 779 F. Supp. 578, 586 (M.D. Fla. 1991) (Describing similar requirements in the Eleventh Circuit)

There are two recognized bases for personal jurisdiction over out of state defendants: (1) "general jurisdiction" which arises when, a defendant's contacts with the forum state are

so pervasive as to justify the exercise of jurisdiction over the person in all matters, and (2) "specific jurisdiction" which arises out of the defendant's contacts with the forum giving rise to the subject litigation. *See Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). In view of the criteria advanced in *Helicopteros*, the allegations of the complaint, and testimony presented during an evidentiary hearing held below, it is clear that the facts of this case do not support an assertion of general jurisdiction over Respondent. The uncontroverted testimony of Respondent's corporate representative was that during the relevant period of time Respondent was not a resident of California, had no offices or facilities in California, was not licensed to do business in California, did not operate or manage any hotels in California, nor owned any real property in the state.

With regard to specific jurisdiction, the Ninth Circuit, in *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977), has recognized that in California the significant contacts between a party and the subject forum required by *International Shoe* do not exist unless the party through some act purposely avails itself of the benefits of the forum state. *See also Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir. 1986); *Indiana Plumbing Supply, Inc. v. Standard of Lynn, Inc.*, 880 F. Supp. 743 (C.D. Cal. 1995).

Again, at the hearing before the district court, Respondent's corporate representative unequivocally stated that Respondent has never done any business in California, has never been a resident of California, and has never maintained a regular and established place of business in California. This evidence was unrefuted by Petitioner who was given an opportunity to present evidence to the contrary not only during the hearing but also for thirty days thereafter.

The only evidence presented by Petitioner in an attempt to refute Respondent's testimony was a declaration from its attorney which attached pages from a hospitality trade publication and a San Francisco telephone book which purportedly identified two hotels in San Francisco as belonging to Respondent. This "evidence" was easily refuted by Respondent's witness who explained that the only reason the owner of the two hotels (HCP, Inc., a company totally separate and independent from Respondent) was permitted to associate the Respondent name with the two San Francisco properties was so that they could use Respondent's toll-free reservations telephone number.[4] This, however, did not mean that Respondent had any ownership interest in the San Francisco hotels or that Respondent had anything to do with the management of said hotels. In short, the only connection between Respondent and the two San Francisco hotels was a shared toll-free reservations telephone line from which Respondent derived no benefit. Accordingly, Respondent has not purposefully availed itself of the benefits of the State of California.

Moreover, Respondent established through the unrefuted testimony of its witness that the activities conducted by Respondent on behalf of hotels owners are limited to management of their hotels, not operation, specification, purchase or installation of telephone equipment. Therefore, even if Respondent did conduct some activities in California (which it did not), the Petitioner's cause of action would not arise out of those activities. That fact alone, under California law, would act as a bar to personal jurisdiction. *See Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977).

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4. The same witness testified that the toll-free reservations number was answered by a company in Texas, not California.

After reviewing all of the evidence presented and reviewing all legal argument from counsel, the district court properly determined, and the circuit court agreed, that any contacts between Respondent and California were extremely minimal and did not justify either general or specific jurisdiction. This Court should not disturb that correctly reached conclusion.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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